IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 88 OF 2000.

Martinho s/o Caetano Fernandes,
r/o H.No. 460/1, Curilo,
Majorda, Goa. ... Appellant.

Versus

State. ... Respondent.

Mr. S.K. Kakodkar, Senior Advocate with Mr. J.J. De Souza, Advocate for the Appellant.

Mrs. W. Coutinho, Addl. Public Prosecutor for the Respondent State.

Coram: P.V. HARDAS, J.

Date: 10th January 2003.

ORAL JUDGMENT.

The appellant, who stands convicted by the learned Sessions Judge, South Goa, Margao, by his Judgment dated 6th December 2000, in Sessions Case No. 13 of 1994, for offences punishable under Sections 304(1) and 452 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs. 15,000/-, in default to undergo simple imprisonment for one year and rigorous imprisonment for 1 year and to pay fine of Rs. 5,000/-, in default to undergo simple imprisonment for 6 months respectively, has filed the present appeal challenging the aforesaid conviction and sentence.

2. The brief facts necessary for the decision of the appeal are set out hereunder:-

In December 1993 P.W.16 P.S.I. Bossuet D'Silva was attached to Colva Police Station as a P.S.I. and Officer-in-Charge. On 31st December 1993 at about 11.45 p.m. one Santan Fernandes, P.W.5 came to Colva Police Station and lodged a complaint alleging that the accused had stabbed his brother Luciano Fernandes with a knife at their residence at Curilowaddo, Majorda. P.W.5 Santan had further informed P.W.16 P.S.I. D'Silva that the injured was taken to Hospicio Hospital. On the basis of the complaint, an offence under Sections 452 and 307 of the Indian Penal Code, vide Crime No. 94/93, came to be registered. P.W.16 P.S.I. D'Silva went to the Hospicio Hospital at Margao and collected the hurt certificate. The injured was, thereafter, shifted by the Hospital Authorities to the Goa Medical College at Bambolim. While the injured was being shifted to the Goa Medical College, the accused was brought to the Hospicio Hospital by some residents of Nuvem in a Maruti Van. P.W.14 Glen D'Souza informed P.W.16 P.S.I. D'Silva that the accused was noticed lying on the road side after having met with an accident on a scooter. The accused had injuries on his face and was admitted in the Hospicio Hospital during the night. P.W.16 P.S.I. D'Silva then conducted the scene of offence panchanama, which is at Exhibit P.W.6/A, in the presence of P.W.6 Roque Godinho. The photographs of the scene of offence are at Exhibit X-2. From the scene of offence P.W.16

P.S.I. D'Silva attached one pillow case stained with blood, a pair of bathroom slippers, which are M.O.1, M.O.2 and M.O.3. The accused came to be arrested at Colva Police Station vide Exhibit 36, in the presence of P.W.13 Alex Lourenco. The clothes which the accused were wearing were also attached and the half pant of the accused is M.O.4..

3. On 3rd January 1994, P.W.16 P.S.I. D'Silva recorded the dying declaration of the deceased after obtaining the certificate of the doctor that the injured was in a fit condition to give his statement. The endorsement of the medical officer appears on Exhibit 45. The dying declaration is at Exhibit 44. The injured it appears succumbed to his injuries on 23rd January 1994.

4. On 5th January 1994 the accused is alleged to have made a disclosure statement, in the presence of P.W.15 Mauvin Telles and one Ayres D'Souza, that he would point out the knife which he had hidden. The memorandum and the panchanama is at Exhibit 39. However, in pursuance to the statement, the knife was not discovered. The accused was sent for determining his blood group, which was determined as 'O' Rh Positive vide certificate at Exhibit 46. The blood group of the deceased Luciano was determined as 'A' Rh Positive, vide

certificate at Exhibit 47. P.W.16 P.S.I. D'Silva then conducted the inquest panchanama in the presence of P.W.2 Agnelo Fernandes and the panchanama is at Exhibit P.W.2/A. The dead body was then referred for postmortem examination and the postmortem examination was conducted by P.W.1 Dr. E.J. Rodrigues. The postmortem report is at Exhibit P.W.1/A. According to P.W.1 Dr. Rodrigues, he had found irregular shaped infected wound of 13 cms. x 8 cms. in its upper portion and 6 cms. in its lower portion into abdominal cavity deep exposing the muscles with foul smelling discharging puss coming out from the wound. According to P.W.1 Dr. Rodrigues, this injury was caused due to sharp penetrating weapon. On internal examination he found that there was an infected wound on the right side diaphragmatic region communicating with right plural cavity of 1.5 x 1 cms.. There was foul smelling discharging puss coming out of the penetrating wound with exposure and gangrene of abdominal muscles around injury no. 1. The peritoneum cavity contains 1.5 litres of yellow foul smelling peritonial fluid-peritoneum. There was gangrene and adhesions of loops of intestines all over, more so on right side. P.W.1 Dr. Rodrigues, therefore, opined that death was due to septicemia and peritonitis subsequent to penetrating injury to abdomen. He further opined that injury no. 1 was fatal and was sufficient to cause death of a person in the ordinary course of nature. The

said injury, according to him, also cut the intestines, causing the spillage of fecal matter and which resulted in peritonitis. Further, according to him, the injury could be caused by a kitchen knife.

5. P.W.16 P.S.I. D'Silva attached the nightie of P.W.3 Julie in the presence of P.W.7 Bernardo Pereira. The attachment panchanama is at Exhibit P.W.7/A. The nightie of P.W.3 Julie is M.O.5. After completing the investigation, he filed a charge-sheet before the Court on 11th February 1994. The report of the Chemical Analyser is at Exhibit 49. The Chemical Analyser found that pillow and one slipper were stained with blood group 'A'. While the other slipper and the half pant of the accused were stained with human blood. The Chemical Analyser could not opine about the blood on the nightie.

6. The learned Sessions Judge, South Goa, Margao, vide Exhibit 7 framed a charge against the accused for an offence punishable under Sections 452 and 302 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 16 witnesses. The prosecution mainly relied on the evidence of the eye witnesses, namely, P.W.3 Julie and P.W.8 Filomena Fernandes. The learned trial Court accepted the evidence of the two eye witnesses as well as the dying declaration of the

deceased and convicted and sentenced the accused as aforestated. Hence, the present appeal.

7. Mr. Kakodkar, the learned senior counsel appearing on behalf of the appellant, has urged before me that the prosecution has not been able to establish the motive by cogent and reliable evidence. He also submitted that there was considerable delay in recording the statements of the eye witnesses and no explanation whatsoever has been given by P.W.16 P.S.I. D'Silva. He has also urged before me that there are contradictions in the evidence of the eye witnesses regarding the size of the knife. He further submitted that Exhibit P.W.5/A cannot be treated as the First Information Report as the police had been earlier informed by wireless message and the wireless message constituted the First Information Report. He has also urged that the dying declaration cannot be relied upon in the absence of the examination of the doctor and the certificate of the doctor on the dying declaration that the injured was in a fit condition to give his statement.

8. Mrs. Coutinho, the learned Additional Public Prosecutor on behalf of the State, has urged before me that the evidence of the eye witnesses is the evidence of natural witnesses who were residing in the house and the delay simpliciter in the examination of these

witnesses would not render their evidence doubtful. She has further urged that the explanation for delay in recording the evidence of P.W.3 Julie has been brought out in the cross-examination itself. She has also urged that the wireless message received by the police was a cryptic message and, therefore, the prosecution is right in not relying on the wireless message as the First Information Report.

9. P.W.3 Julie, widow of deceased Luciano is the eye witness. She states that on 31st December 1993 at about 7.00 p.m. her husband, deceased Luciano, returned to the house and left the house at about 8.00 p.m., after taking his bath. After dinner the deceased Luciano was polishing his shoes for attending the midnight Mass and at that time the accused came and called the deceased. The deceased opened the door and went out to the verandah followed by P.W.3 Julie. The accused then came inside the verandah and started inquiring with the deceased as to who is Johnson. The deceased thereupon replied to the accused to go and find out himself as the deceased did not know him. The accused then gave two fist blows on the deceased. The brother-in-law and mother-in-law of P.W.3 Julie came and separated the accused. P.W.5 Santan took the accused from the verandah but the accused came running into the room through the main door and dealt a knife blow on the

deceased. The accused removed the knife and ran away. Meanwhile P.W.10 Pedrina Fernandes, sister of the deceased reached the house in the bus of Majorda Beach Hotel. The deceased was removed to the Hospicio Hospital, Margao in the said bus. The deceased was then shifted to the Goa Medical College, Bambolim, and, thereafter, succumbed to his injuries on 23rd January 1994.

10. In the cross-examination P.W.3 Julie has admitted that the motive for the assault was disclosed to her by the deceased. She has admitted that she does not know if any people from the neighbouring houses came to their house on hearing the shouts. She has admitted that her statement was recorded on 18th January 1994. Similarly she has also admitted that the talk between the accused and her husband in the verandah took place for about five minutes. She has also admitted that she had seen the knife in the hands of the accused for the first time when he was giving the knife blow on the back of her husband. She has also admitted that the accused delivered two knife blows. However, one injury was caused by both the blows. According to her the length of the knife was 12 inches.

11. The evidence of this witness is assailed principally on the ground that she has stated that the

length of the knife was 12 inches whereas P.W.5 Santan has stated that the knife in the hands of the accused had a blade of about 6 inches and a handle of 4 inches. The other ground of attack is that the prosecution had recorded her statement after a considerable delay and no explanation whatsoever for this delay is given by P.W.16 P.S.I. D'Silva. A reference to the evidence of P.W.16 P.S.I. D'Silva indicates that in the cross-examination such an explanation was brought forth. P.W.16 P.S.I. D'Silva states: "I could not secure the presence of Julie PW3 before 18.1.94 and I recorded her statement on 18.1.94 at her residence. Whenever I visited her house to record her statement she was not available and under law I am prevented by calling her at the police station. When I went on 3.1.94 to GMC ward P.W.3 was not there, but sister Pedrina of the deceased was there." Thus, an explanation has been given by P.W.16 P.S.I. D'Silva, no doubt, in the cross-examination. In the absence of any further cross-examination in this regard, the explanation has to be accepted. In any event delay simpliciter in recording the statement of an eye witness would not render the evidence of an eye witness dubious unless evidence is brought on record that though the witness was available, the Investigating Officer was deliberately marking his time and avoiding to record the statement in order to give colour and shape to the prosecution case. Such is not the case here. An

explanation has been offered by P.W.16 P.S.I. D'Silva for late recording of the statement of P.W.3 Julie and the explanation is found to be satisfactory. P.W.3 Julie is a natural witness, whose presence at the scene of offence cannot be doubted. Mere discrepancy in describing the knife to be 12 inches would not make her evidence liable to be discarded. There is nothing in the cross-examination to discredit the version of P.W.3 Julie.

12. P.W.5 Santan states that, on 31st December 1993, he was sleeping in his house and, on hearing the noise, came out and saw the accused quarrelling with the deceased in the verandah. P.W.5 Santan then took the accused out of the verandah but, in the meanwhile, the accused got himself released and ran into their house. When P.W.5 Santan went inside the house he saw the accused going out of the house holding the knife in his hands. He noticed that the deceased had a bleeding injury on the right side of his waist. In the cross-examination he has admitted that he did not go to the police station to lodge his complaint but while on his way to the police station he met the police and, therefore, returned home. He also admitted that he does not know what was the motive behind the attack. He also stated that when he went into the verandah P.W.3 Julie, his mother as well as Filomena were in the verandah.

Again, in respect of this witness, there is hardly any cross-examination worth the name to discredit the evidence of this witness. This witness was a natural witness residing in the house.

13. P.W.8 Filomena, sister of the deceased, also corroborates the version of P.W.3 Julie. Ofcourse there is an omission that the accused gave a slap on the neck of the deceased. She is, however, firm that the accused came inside the house and stabbed the deceased. She also states that P.W.3 was present by the side of the deceased when the accused stabbed the deceased. She admits that there was no blood on her clothes and she shouted for help after the accused stabbed the deceased. She also states that about 5 to 6 neighbours came in response to her shouts.

14. The prosecution has also relied on the dying declaration at Exhibit 44, which was recorded by P.W.16 P.S.I. D'Silva. It is true that there is no endorsement of the doctor on the dying declaration that the deceased was in a fit mental condition to give his statement. However, an endorsement to that effect is to be found in Exhibit 45, which is a letter addressed to the Ward-in-Charge. On Exhibit 45, the Medical Officer has endorsed that the injured was fit to give his statement. The Medical Officer in this case has also

not been examined. According to me, nothing turns either on the absence of the endorsement on the dying declaration or the non-examination of the Medical Officer, in view of the strong, reliable and cogent evidence of the eye witnesses. In the dying declaration the deceased has admitted that the incident was witnessed by his mother and wife. The prosecution has not examined the mother of the deceased. Quality and not quantity is necessary for proving the offence beyond reasonable doubt against the accused. Moreover, no adverse inference can be drawn against the prosecution for its failure to examine the mother of the deceased. The evidence of P.W.3 Julie is convincing and at the close of the cross-examination, she emerges as a truthful witness without any blemish.

15. It is true that P.W.16 P.S.I. D'Silva has admitted that at about 11.00 p.m. a phone message was received from P.C. 3315 from Hospicio Hospital duty that the deceased was brought to the said hospital as a victim of stab injuries and that he was shifted to the Goa Medical College Hospital. The said wireless message is extremely cryptic and could not be treated as an F.I.R.. No details of the cognizable offence are stated in the said wireless message and, therefore, the prosecution has rightly treated Exhibit P.W.5/A, a report by P.W.5 Santan as the First Information Report.

16. I have given my anxious consideration to the evidence led by the prosecution and I an unable to agree with the submissions of the learned counsel for the accused that the prosecution has not been able to establish the offence against the accused beyond reasonable doubt. The prosecution has led reliable and cogent evidence in the form of eye witnesses. The eye witnesses have not been discredited in the cross-examination and there is no reason to disbelieve the eye witnesses. Minor contradictions and omissions not touching the core of the prosecution should not impel the Court to discard the evidence of otherwise reliable witnesses.

17. In the alternative it is argued that the incident is of the year 1993 and the accused since 1982 is suffering from Guillain-Barre Syndrome. This is a common disease of uncertain cause involving the peripheral nerves. The treatment requires hospitalisation for observation. On this basis, it is urged before me that the sentence should be reduced to the one already undergone by the accused. In the present case the accused has undergone barely three months of imprisonment and it would be extremely unjust and improper to allow the accused to suffer only the sentence which has been undergone. However, looking to the age of the accused and the illness of which he is

stated to be suffering, according to me, the sentence of imprisonment of seven years can be substituted by an imprisonment for the term of four years. According to me, the ends of justice would be subserved by altering the sentence from 7 years to 4 years while maintaining the conviction and the sentence under Section 452 of the Indian Penal Code.

18. In the result, therefore, the appeal is partly allowed. The conviction and sentence of the accused under Section 452 of the Indian Penal Code is, hereby, confirmed. The conviction for the offence punishable under Section 304(1) of Indian Penal Code is, hereby, confirmed. The sentence of 7 years is modified to that of 4 years. While the sentence of fine of Rs. 15,000/- and the in default sentence is maintained. Eight weeks' time is granted to the accused for surrendering to his bail. The bail bond stands cancelled.

(P.V. HARDAS)
JUDGE.

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